

InterConnect



Best Lawyers®
**LAW FIRM
OF THE YEAR**

U.S. News
& WORLD REPORT

TRANSPORTATION LAW
2016

Benesch has been named **Law Firm of the Year in Transportation Law** in the 2016 Edition of U.S. News & World Report/Best Lawyers® “Best Law Firms” ranking.

Only one law firm per practice area in the U.S. is receiving this recognition, making this award a particularly significant achievement. This honor would not have been possible without the support of our clients, who both enable and challenge us every day, and the fine attorneys of our Transportation & Logistics Practice Group.

The U.S. News & World Report/Best Lawyers® “Best Law Firms” rankings are based on an evaluation process that includes the collection of client and lawyer evaluations, peer review from leading attorneys in their field and review of additional information provided by law firms as part of the formal submission process. For more information on Best Lawyers, please visit www.bestlawyers.com.

Counsel for the Road Ahead®

Out Like A Lion?

Don't Be a Fish Out of Water: Get Compliant With the FMC's Final Rule on OTI Licensing

But the FDA Dragged its Feet, Why Can't I?: Why Waiting Is Not an Option for FSMA Compliance

There's a Chapter 15?: A Look at the Impact of Chapter 15 Bankruptcy Proceedings on Trade Creditors

Out of Control: The Quandary of the Statutory Employer

Recent Events

On the Horizon



Marc S. Blubaugh

Out Like A Lion?

The waning weeks of calendar year 2015 witnessed a remarkable convergence of regulatory and legislative activity affecting the transportation industry. For instance, the Federal Motor Carrier Safety Administration (FMCSA) issued final rules regarding electronic logging devices and driver coercion, an overhauled Unified Registration System was implemented, the Federal Aviation Administration implemented a new registration system for airborne drones, and shippers are preparing to begin verifying the gross mass of cargo containers in light of the International Maritime Organization's rule effective July 1, 2016. Moreover, the U.S. Congress stepped in and intervened on positive train control and hours of service, and, of course, enacted the 600-page highway bill known as the Fixing America's Surface Transportation Act (the FAST Act), which itself not only provided for highway funding but also contained a potpourri of items affecting the transportation industry, ranging from opening the doors to hair follicle drug testing to enabling military veterans to more easily obtain commercial driver's licenses in certain circumstances. Any of these subjects—and many others—merit substantial analysis.

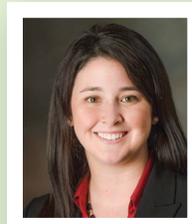
However, one subject that deserves particular attention is the FAST Act's reform of the Compliance, Safety, Accountability (CSA) system. Specifically, the FAST Act requires the FMCSA to commission the National Research Council of the National Academies to undertake a thorough examination of CSA, including the critical Safety Measurement System utilized by the CSA program. The mandated examination will focus on whether a motor carrier's Behavior Analysis and Safety Improvement Categories (BASICs) correlate

continued on page 7

Don't Be a Fish Out of Water: Get Compliant With the FMC's Final Rule on OTI Licensing



Stephanie S. Penninger



Brittany L. Shaw

The United States Federal Maritime Commission (FMC) issued its Final Rule on November 3, 2015, regarding the financial and other requirements of freight forwarders and non-vessel operating common carriers (NVOCC). Located in 46 CFR Part 515, the new rules are meant to adapt to a changing industry by improving regulatory effectiveness and transparency and streamlining processes while reducing regulatory burdens.

An article discussing the potential changes regarding the licensing of Ocean Transportation Intermediaries (OTIs) was published in the February issue of *Benesch Currents*. It is vital for NVOCCs and ocean freight forwarders (OFFs) to review these changes in order to implement them into their business practices, including contracts and policies.

The main changes can be broken down into seven categories, which include: redefined terms; changes to current OTI license requirements; reporting requirements; financial requirements; registration and renewal; business records; and appeals process clarification.

CONGRATULATIONS!

Stephanie Penninger was appointed to the Maritime Law Association of the United States Special Committee on Cybersecurity. Cybersecurity is an issue that is in the forefront both inside and outside the maritime industry. This newly formed committee will address some of the most pressing cybersecurity concerns facing the maritime industry and other sectors of worldwide commerce. This appointment is effective immediately and extends until the Annual Meeting of the Association in May 2016.

Definitions. "Freight forwarding services" are now defined in broader terms, to include the preparation of "export documents, including the required 'electronic export information'" and "[p]reparing and/or processing common carrier bills of lading or other shipping documents." Moreover, "[r]egistered non-vessel-operating common carrier" is defined as a "NVOCC whose primary place of business is located outside the United States and who elects not to become licensed as a NVOCC." Foreign-based NVOCCs will have to register with the Commission, post bond or surety and publish a tariff. § 515.2(h), § 515.2(r).

OTI license requirements. Moving forward, when considering an OTI for licensure, the Commission may consider: violations of any shipping or international trade laws; operating as an OTI without a license or registration; state and federal felonies and misdemeanors; bankruptcies; tax liens; judgments and proceedings; compliance with immigration status requirements; negative history associated with a Transportation Worker Identification Credential (TWIC); and negative customs broker's license history. §515.11(a)(2).

NVOCC licensing and registration. Common carriers may not knowingly or willfully transport cargo for an NVOCC unless the carrier has confirmed that the NVOCC is licensed or registered and compliant with tariff and bond requirements. Common carriers may review the list of licensed and registered NVOCCs, along with their tariff and financial responsibility compliance, on the FMC's website. § 515.27(a), § 515.27(b).

Reporting requirements. OTIs are now required to report to the FMC the following changes: a change in business address; a conviction or indictment of the licensee (or other key individuals); a bankruptcy filed by or naming a licensee (or other key individuals); or a change of partners, members, managers or ownership of five percent (5%) or more; and the addition or reduction of one or more branch offices. § 515.20(e).

But the FDA Dragged its Feet, Why Can't I?: Why Waiting Is Not an Option for FSMA Compliance

Financial requirements. While branch offices of licensed OTIs have to be reported to the FMC, OTIs are no longer obligated to maintain additional financial responsibility for unincorporated branch offices. However, OFFs will still be required to post a \$50,000 bond, licensed NVOCCs a \$75,000 bond, and registered foreign-based NVOCCs a \$150,000 bond. § 515.4(b), § 515.21(a).

Registration and renewal. Foreign-based registered NVOCCs are required to use a licensed OTI as their agent when performing OTI services within the United States. Additionally, licensees must now renew their licenses every three (3) years, with the renewal registration process being completed sixty (60) days prior to expiration. These renewal requirements will not be effective until December 9, 2106. § 515.3, § 515.14(c) and § 515.14 (d).

Business records. OTI business records must be kept in a ready-for-use form and in a manner such that they are readily available to the Commission upon its request. § 515.33.

Clarification in appeals. The new Rule streamlines the appeals process for OTIs facing denial, revocation or suspension of their licenses. Now, OTI applicants or licensees may submit information and documentation in support of their OTI licenses, or, in the case of a revocation or suspension, the continuation of a current OTI license. § 515.17.

OTIs should be aware that the new Rule's requirements became effective on December 9, 2015, except license renewal amendments, which will go into effect on December 9, 2016.

For more information, please contact **STEPHANIE S. PENNINGER** at spenninger@beneschlaw.com or (317) 685-6188, or **BRITTANY L. SHAW** at bshaw@beneschlaw.com or (317) 685-6118.



Christopher J. Lalak

As those who have been following the progress of the Food Safety Modernization Act (FSMA) are aware, implementation of the legislation has been anything but speedy.

The FSMA, which was signed into law back in 2011, authorizes the Food and Drug Administration (FDA) to implement regulations geared toward food safety and has no true impact until these underlying regulations become effective. To put it mildly, the FDA has been slow to release these regulations. So slow, in fact, that the FDA has been subjected to litigation by

food safety advocacy groups as a result of its lack of responsiveness.

Given the FDA's apparent lack of urgency to this point, it comes as no surprise that many carriers, shippers and 3PLs are inclined to take their cue from the federal agency and continue to defer preparing for the regulations, regardless of the fact that two of the five implementing regulations are now published in final form,¹ and the Sanitary Transportation of Food Rule is expected in just a few short months.² After all, given the history of the FSMA, there is little reason suspect that the FDA's enforcement of the regulations will be swift.

In preparing for the regulations, however, all segments of the transportation industry should keep in mind that the FSMA will not only be enforced by the FDA, but that it will also be enforced through litigation as well.

Strictly by way of example, the Centers for Disease Control and Prevention estimates that 128,000 people are hospitalized and that 3,000 people die from foodborne illness each year.³ Realistically, any carrier, shipper, 3PL, processor or retailer involved in the sale and transportation of suspect food is likely to find itself named as a defendant in any litigation stemming from such an instance, and would thus need to prove that it that it exercised reasonable care over the food when it was in its custody. Prompt compliance with the FSMA is almost certain to be a key factor in making such a showing. Moreover, recognizing the risk attendant to the transportation of food under the FSMA, it is a distinct possibility that larger retailers will require documented FSMA compliance from their supply chain before the FDA itself ever gets around to enforcing the regulations.

Furthermore, given the strict temperature control requirements found in the draft Sanitation and Transportation Food Rule,⁴ freight claims for "adulterated" food may begin immediately upon the rule's effective date. In this instance, the FDA's enforcement will be immaterial to the ensuing freight claim litigation.

In light of the imminent nature of the FSMA regulations, all segments of the food transportation industry should begin discussing plans for compliance with their respective counterparts in the supply chain and establish plans for compliance with the final effective rules. Such plans would vary depending on the precise nature of the food, but should include, at a minimum, plans for temperature control compliance, sanitation compliance, record-keeping procedures and driver training procedures.

For more information contact **CHRISTOPHER J. LALAK** at clalak@beneschlaw.com or (216) 363-4557.

¹ The FDA published its Final Rule for Hazard Analysis and Preventative Controls on September 15, 2015, and its Foreign Supplier Verification Program on October 31, 2015.

² The Final Rule on Sanitary Transportation of Human and Animal Food, or the "Sanitary Transportation of Food Rule," expected to be the most impactful of the FSMA regulations to the transportation industry, is scheduled to be published March 31, 2016.

³ <http://www.cdc.gov/foodborneburden/>

⁴ The Sanitary Transportation of Food Rule's strict temperature control requirements were explored in the [February 2015](#) and [May 2015](#) issues of Benesch *Setting the Table*.

There's a Chapter 15?: A Look at the Impact of Chapter 15 Bankruptcy Proceedings on Trade Creditors



Kevin M. Capuzzi

Recently, Japanese bulk-shipping company Daiichi Chuo Kisen Kaisha sought bankruptcy protection in both Tokyo and New York. The company, which features a fleet of 185 vessels used

primarily to transport cargo such as limestone, cement and coal overseas, commenced its United States bankruptcy proceedings by filing a Chapter 15 petition in the United States Bankruptcy Court for the Southern District of New York. While many trade creditors and other parties-in-interest may be accustomed to Chapter 7 and Chapter 11 liquidations and reorganizations, a Chapter 15 may be a foreign concept (pun intended).

A Chapter 15 bankruptcy proceeding is intended to protect and maximize the value of a foreign debtor's assets located in the United States while the debtor is engaged in a foreign insolvency proceeding. Absent this cross-border mechanism, a foreign debtor's U.S.-based assets would not be protected by the automatic stay and, therefore, would be within the reach of its creditors, notwithstanding the foreign insolvency proceeding. This is an important concern to debtors like Daiichi, as, at any given time, one or more of its vessels may be docked in a United States port, subject to seizure by one of its creditors. But, by filing a Chapter 15 petition and obtaining the legal recognition of its foreign insolvency proceeding by a United States Bankruptcy Court, a foreign debtor's assets located in the United States are protected by the automatic stay provisions of the Bankruptcy Code.

While Chapter 15 is a powerful tool for a foreign debtor, how does such a proceeding affect the debtor's creditors in the United States? For example, domestic shippers in the interline transportation chain with Daiichi may possess claims against, or be subject to claims by, Daiichi. This article looks at what are generally the two most important concerns of creditors—(1) the filing of a proof of claim against the debtor and (2) whether the creditor may be subject to a preference suit—but through the lens of a Chapter 15 bankruptcy proceeding.

Most trade creditors are familiar with the concept of a proof of claim and the general requirement that a claim be filed to share in distributions made from a bankruptcy estate. While the claim procedure may be well understood in the context of a Chapter 7 or Chapter 11 bankruptcy proceeding, trade creditors must give close attention to the required procedures in a Chapter 15 case. While the procedures vary from case to case, oftentimes the foreign debtor will direct creditors to file claims in the foreign proceeding, not the Chapter 15 case. Thus, it is critical that trade creditors understand, among other things, where claims need to be sent and provide enough delivery time so that the claim arrives before the claim bar date, especially if the claim is being sent overseas.

Aside from timely filing a proof of claim, most trade creditors want to know if they have exposure to a preference lawsuit, which generally allows a debtor to recover payments made to a creditor within the 90 days prior to the filing of a bankruptcy proceeding. Fortunately for creditors, when Congress enacted Chapter 15 of the Bankruptcy Code,

it did not give Chapter 15 debtors the same avoidance powers that it gave to Chapter 7 and Chapter 11 debtors. Subsequent decisions have confirmed that Chapter 15 debtors do not have authority to bring preference and fraudulent transfer actions; however, those debtors are generally permitted to exercise avoidance powers that arise under the law of the foreign proceeding. So, for instance, while a Daiichi creditor may not be faced with a typical preference suit, it could potentially be subject to an action arising under Japanese law. Thus, a trade creditor should still have a mechanism in place to closely monitor for complaints and other legal proceedings filed against it during the course of a Chapter 15 bankruptcy case.

With the recent downturn in certain European and Asian markets, trade creditors in the United States may find themselves involved in a Chapter 15 bankruptcy proceeding. While those creditors may be familiar with Chapter 7 and Chapter 11 proceedings, as this article indicates, a Chapter 15 case is distinguishable from those proceedings. Even routine concepts such as the filing of proofs of claim and preference litigation are different in a Chapter 15 proceeding. Creditors would therefore be well-advised to seek legal counsel in those circumstances.

Benesch, Friedlander, Coplan & Aronoff LLP's bankruptcy professionals are available to assist, including in Delaware and New York, where the large majority of bankruptcy proceedings are filed.

For more information please contact **KEVIN M. CAPUZZI** at kcapuzzi@beneschlaw.com or (302) 442-7063.

Out of Control: The Quandary of the Statutory Employer



Stephanie S. Penninger



Brittany L. Shaw

Continuing the saga of being held responsible as a statutory employer for the acts of a subcontractor's employee driver, the South Carolina Supreme Court recently upheld a decision to hold another motor carrier liable for a workers' compensation claim when a subcontractor's expedited delivery service driver was fatally injured while returning from a contracted load. The subcontractor did not have adequate workers' compensation insurance; therefore, the upstream motor carrier was held liable regardless of the fact it exercised no control over the employee once the delivery in Wisconsin had occurred.

In *Collins v. Seko Charlotte* (Op. No. 27519, Apr. 29, 2015), Gregory Collins was a driver for West Expedited & Delivery Service, Inc. (West Expedited), which as a subcontractor, contracted with Seko Charlotte to deliver certain goods in interstate transportation. On his way back to South Carolina, after completing a delivery in Wisconsin for Seko Charlotte, by way of West Expedited, Collins was involved in a fatal collision. Seko Charlotte and West Expedited were both in the cargo delivery business, but Seko Charlotte engaged in business with West Expedited roughly two or three times a month for transporting parts. Although there was no written contract for this shipment, Seko Charlotte and West Expedited followed West Expedited's custom of having Seko Charlotte pay for mileage one way, but West Expedited included the cost of the return trip in the mileage rate. After the fatal incident, Collins' dependents filed a workers' compensation claim against West Expedited, but West Expedited did not carry workers' compensation insurance at the time of Collins'

fatal accident. Accordingly, Collins' dependents also filed a similar claim against Seko Charlotte, Seko Worldwide and its insurance company.

The case was originally heard by the Workers' Compensation Commission where the commissioner applied the *Voss v. Ramco, Inc.*, 482 S.E.2d 582 (Ct. App. 1997) three-part test to determine whether Collins was Seko Charlotte's statutory employee at the time of his death. The three-part test requires the court to consider "whether (1) the activity of the subcontractor is an *important* part of the owner's trade or business; (2) the activity performed by the subcontractor is a *necessary, essential, and integral* part of the owner's business; or (3) the *identical activity* performed by the subcontractor has been performed by employees of the owner." *Id.* at 586 (emphasis added). The Workers' Compensation Commission applied the three *Voss* factors and determined that Collins was a statutory employee. Therefore, Seko Charlotte was found liable.

Seko Charlotte appealed the order and the appeal was heard by the Appellate Panel of the Commission. The Appellate Panel applied the employee/independent contractor test's four factors and concluded Collins was not an employee of Seko Charlotte on the return trip because West Expedited had "exclusive right of control over [Collins]" after the deliveries were made in Wisconsin. The Appellate Panel reversed the decision. Next, the case was appealed to the Court of Appeals, where the Court found that the Appellate Panel of the Commission had erred when it applied the employee/independent contractor test instead of the statutory employee test. Therefore, the Court of Appeals concluded that Collins was a Seko Charlotte statutory employee. The South Carolina Supreme Court granted the petition for a writ of certiorari to review the decision.

Seko Charlotte argued the Court of Appeals erred in holding Collins was a statutory employee at the time of the accident because the contract between West Expedited and

Seko Charlotte terminated when the delivery was made in Wisconsin. On the contrary, the Uninsured Employers Fund (Fund), brought into the case because West Expedited lacked workers' compensation at the time of Collins' fatal accident, claimed that the return trip was "necessarily incidental to [Collins'] statutory employment with Seko." Additionally, the Fund claimed that Collins was a "traveling employee," and did not meet the exception to the rule because he "did not deviate from the most direct route to return him to South Carolina."

The South Carolina Supreme Court found that the Court of Appeals was correct in concluding that the statutory employee test should be applied. Seko Charlotte conceded that Collins was a statutory employee on the trip to Wisconsin. The issue then became whether Collins' status as a statutory employee changed once the delivery was made. The court found that the contract between two parties only provides a "necessary foundation for the creation of the statutory employee relationship." However, once the statutory employee status attaches, the extent of the status is determined not by the contract itself, but by the nature of the work contracted to be performed. Here, the nature of the work for Seko Charlotte's direct employees was the same as that performed by Collins. Collins was providing a "express hot delivery" service from South Carolina to Wisconsin, which in the industry is known as an immediate and direct trip where it is unlikely that a driver will have cargo on the return trip. In this situation, Seko Charlotte frequently used West Expedited's services, this trip was to solely transport Seko Charlotte's load and West Expedited typically would not pick up another customers' loads for the return trip to South Carolina. The court also determined that the nature of the work required immediate travel to Wisconsin and an expected return trip to South Carolina. Furthermore, Collins' work for Seko Charlotte did not end until he returned to South Carolina.

continued on page 6

WHAT'S
TRENDING

Friend us on Facebook:
www.facebook.com/Benesch.Law



Follow us on Twitter:
www.twitter.com/BeneschLaw



Subscribe to our YouTube Channel:
www.youtube.com/user/BeneschVideos



Follow us on LinkedIn:
<http://www.linkedin.com/company/benesch-friedlander-coplan-&-aronoff/>

Pass this copy of *InterConnect* on to a colleague, or email **MEGAN PAJAKOWSKI** at mpajakowski@beneschlaw.com to add someone to the mailing list.

If you would like to receive future issues of the newsletter electronically, please email **SAM DAHER** at sdaher@beneschlaw.com.

Out of Control: The Quandary of the Statutory Employer

continued from page 5

Finally, the court found that the three-part *Voss* test further supported Seko Charlotte's status as a statutory employer, noting that Seko Charlotte is: (1) in the cargo delivery business; (2) interstate deliveries are necessary and integral part of its business; and (3) its drivers made similar deliveries as Collins. Additionally, South Carolina Code states, "the owner shall be liable to pay for any workman employed in the work any compensation under this title which he would have been liable to pay if the workman had been immediately employed by him." Since Seko Charlotte covered its own employee drivers on their return trips, Collins was entitled to the same coverage as Seko Charlotte's employees.

As we have advised freight brokers, following the *Atiapo v. Goree Logistics, Inc.*, 770 S.E.2d 684 (N.C. Ct. App. 2015) opinion,¹ to minimize their potential exposure to liability for payment of workers compensation damages to drivers of the motor carriers with which they contract, upstream motor carriers should contractually require that the downstream motor carriers with which they contract obtain workers' compensation insurance and related benefits for their drivers. Additionally, upstream motor carriers should require the downstream motor carriers to have their insurance broker or carrier provide certificates verifying the motor carriers' workers' compensation coverage. Furthermore, upstream motor carriers should ensure they have their own "all states" workers' compensation and employer liability policy in place that will cover their own employees, or depending on the state requirements, an occupational accident policy.

Even if a motor carrier is only paying insurance premiums for its own employees, and not any of its or the downstream carrier's independent contractor owner-operators, in the event that a driver is subsequently found to have been a misclassified worker, the driver's injuries would still presumably be covered by the upstream motor carrier's workers' compensation policy. While an insurance carrier could subsequently require the payment of additional premiums, following a workers' compensation claim and insurance audit, the "AP Audit Risk" could end up being well worth the upstream motor carrier's expense in obtaining a workers' compensation policy to limit its exposure for the type of liability imposed in the *Collins and Atiapo* cases.

For more information, please contact **STEPHANIE S. PENNINGER** at spenninger@beneschlaw.com or (317) 685-6188, or **BRITTANY L. SHAW** at bshaw@beneschlaw.com or (317) 685-6118.

¹ On December 18, 2015, the freight broker in *Atiapo* filed a petition for writ of certiorari with the U.S. Supreme Court, asking that the Court find that the Federal Aviation Administration Authorization Act (FAAAA) preempts the North Carolina statute, N.C. Gen. Stat. § 97-19.1, holding contractors responsible for the workers' compensation benefits of the drivers of uninsured motor carriers that was applied to the freight broker by the North Carolina Court of Appeals. An article discussing the *Atiapo* decision was published in the Summer 2015 issue of Benesch *InterConnect*.

The content of the Benesch, Friedlander, Coplan & Aronoff LLP *InterConnect* Newsletter is for general information purposes only. It does not constitute legal advice or create an attorney-client relationship. Any use of this newsletter is for personal use only. All other uses are prohibited. ©2016 Benesch, Friedlander, Coplan & Aronoff LLP. All rights reserved. To obtain permission to reprint articles contained within this newsletter, contact Megan Pajakowski at (216) 363-4639.

Out Like A Lion?

continued from page 1

to future crash risk, the methodology used to calculate BASICS, the relative value of inspection information and roadside enforcement data, any data collection gaps, accuracy of crash data when a motor carrier was free of fault, inconsistent reporting rates with respect to the same violation in different jurisdictions, and how the public is using CSA data.

The National Research Council must publicly publish and submit its report to Congress and to the Inspector General by June 2017. If the report contains deficiencies, FMCSA must submit to Congress a detailed corrective action plan (including benchmarks, programmatic reforms, proposals, etc.) within the following 120 days (i.e., October 2017). The Inspector General will then review the corrective action plan and submit a report to Congress regarding the responsiveness of the corrective action plan within the next 120 days (i.e., February 2018).

While this timeline stretches years into the future, of immediate practical importance is the prohibition on FMCSA publishing CSA-related data. Specifically, the FAST Act provides that:

... [o]n and after the date that is 1 day after the date of enactment of this Act, **no information** regarding analysis of violations, crashes in which a determination is made that the motor carrier or the commercial motor vehicle driver is not at fault, alerts, or the relative percentile for each BASIC **developed under the CSA program** may be made available to the general public until . . .

(emphasis added). The statute then outlines a variety of certifications that the Inspector General must make before such information can be made publicly available again, such as a certification that the report described above was timely submitted, that deficiencies

in the report have been addressed, that any corrective action plan has been implemented, and the like. FMCSA removed this data from public access immediately after passage of the FAST Act in early December 2015.

Notably, the FAST Act also provides that “[i]nformation regarding alerts and the relative percentile for each BASIC developed under the CSA program may not be used for safety fitness determinations” until the Inspector General makes the certifications mentioned above. This latter prohibition is particularly important in that FMCSA has been developing a new safety rating system wherein safety fitness determinations were to be tied, at least in part, to CSA-related data. FMCSA has been developing the regulations governing this new system since 2007. Although little is known about the contemplated system, the Office of Management and Budget just cleared the proposed regulation last month. Consequently, the industry has been awaiting the publication of the contemplated system pursuant to a Notice of Proposed Rulemaking. FMCSA stated in its December Report on Significant Rulemakings that the Notice of Proposed Rulemaking was still to be published on December 29, 2015. However, no such Notice of Proposed Rulemaking was issued by that date.

Of course, in light of the FAST Act's prohibition on the “use” of data in connection with safety fitness determinations and the general review of the CSA program itself, FMCSA may indefinitely delay publication of the Notice of Proposed Rulemaking. However, depending on the precise form and methodology of the proposed safety fitness determination regulations, FMCSA may instead conclude that it can proceed forward with the new system regardless of any eventual revisions to the CSA program. FMCSA may also believe that it can proceed forward with its rulemaking contemporaneously with the National Research Council's review of the CSA program. At the

present time, FMCSA has not yet publicly stated whether it believes the FAST Act completely ties its hands with respect to the expected Notice of Proposed Rulemaking relating to motor carrier safety fitness determinations.

In any event, shippers, brokers and insurers who have had doubts about the probative value of CSA-related data ever since CSA was rolled out have yet another reason to be highly circumspect about relying on CSA data when selecting motor carriers to use. While FMCSA will still use CSA data for its own prioritization of enforcement efforts, and while shippers, brokers and insurers can legally request that motor carriers disclose such data to them, all involved should tread cautiously. Motor carriers who have received CSA “alerts” or who otherwise appear to be “unsafe” through a CSA prism can now point to the FAST Act and the Congressionally mandated study of CSA data as further good reasons as to why shippers, brokers and insurers should not rely on that data.

At any rate, among the unprecedented flurry of regulatory and legislative developments at the end of 2015, the FAST Act's prohibition on the publication and use of certain CSA-related data is sure to give the industry yet another hot topic to discuss as 2016 gets underway.

For more information, please contact **MARC S. BLUBAUGH** at mblubaugh@beneschlaw.com or (614) 223-9382.

Benesch is proud to announce that **JOEL R. PENTZ** and **JONATHAN TODD** have joined the Benesch Transportation & Logistics Practice Group. With this addition, we continue our commitment to our clients to add experienced industry professionals that strengthen our breadth and depth of services and help meet and exceed our clients' legal needs and expectations.

WELCOME



Joel R. Pentz



Jonathan Todd

Joel R. Pentz has re-joined Benesch as Of Counsel in the firm's Real Estate and Environmental Practice Group and Transportation and Logistics Practice Group, with his practice focused on commercial real estate matters including industrial development, acquisition, divestiture, leasing, financing, joint venture execution and logistics, intermodal and infrastructure assets. He represents, advises and counsels a broad range of clients including manufacturers, distributors, developers, owners, investors and private equity companies in all aspects of industrial real estate and logistics assets. Joel possesses a unique background with substantial industry knowledge and a broad range of business, corporate and real estate experience, both in-house and in private practice as well as in the public and private sector.

His experience in the transportation and logistics arena is rooted in his past role as General Counsel at the Cleveland-Cuyahoga County Port Authority, where his work included participating in the planning of the port's evolution into a major regional logistics and intermodal asset and related public infrastructure improvements. This extensive work included evaluation and planning for the construction of a new confined disposal facility for the storage of river dredge material, the relocation of port assets and related industrial, warehousing and logistics improvements, ancillary intermodal and industrial

development, waterfront redevelopment and related public-private partnership opportunities. This preliminary work has since culminated in regular container shipping service to Europe and related port infrastructure improvements. During his tenure at the Port Authority, Joel had regular and significant interaction with local, state and federal elected officials and governmental agencies, engineers, trade organizations, port customers, 3PL's and other interested stakeholder groups related to policy, construction, environmental, funding and economic development incentives and general business development efforts.

Jonathan Todd joins the firm as Of Counsel in our Cleveland office. He was previously Senior Corporate Counsel with a Transport Topics Top 20 motor carrier, where he served the company's domestic motor carriage, domestic and international forwarding, customs brokerage and global mobility business lines. His experience includes a broad range of corporate, transactional, regulatory compliance, international trade, intellectual property, business operations and strategic planning matters. He brings a deep understanding of the goals, objectives and risk tolerances of the in-house counsel, management and executives driving transportation and logistics business today. Jonathan is also a licensed U.S. Customs Broker and an APICS Certified Supply Chain Professional (CSCP). He holds an MBA in Supply Chain Management in addition to his law degree.

RECENT EVENTS

Admiralty and Maritime Law Committee Meeting—ABA Annual Meeting, 2015

Stephanie S. Penninger attended.
July 31, 2015 | Chicago, IL

Transportation Lawyers Association's Executive Committee Meeting

Marc S. Blubaugh attended as Immediate Past-President.
August 1, 2015 | Madison, WI

Arkansas Association for Food Protection—Annual Educational Conference

Stephanie S. Penninger spoke on *Legal Issues and FSMA Regulations Facing Product Shipping*.
September 9, 2015 | Fayetteville, AR

TCA Independent Contractor/Open Deck Divisions Annual Meeting,

Richard A. Plewacki attended.
September 10–11, 2015 | Chicago, IL

FTR Transportation Conference

Stephanie S. Penninger, Stephanie V. McGowan and Brittany L. Shaw attended.
September 15–17, 2015 | Indianapolis, IN

Arkansas Trucking Seminar

J. Allen Jones, III attended.
September 16–18, 2015 | Bentonville, AR

Logistics and Transportation Association of North America Annual Conference

Eric L. Zalud spoke on purchasing and selling logistics businesses.
September 19, 2015 | Atlanta, GA

Ontario Trucking Association Convention

Richard A. Plewacki attended.
September 21–22, 2015 | Cleveland, OH

Indiana Logistics Summit

Stephanie V. McGowan attended.
September 21–22, 2015 | Indianapolis, IN

Intermodal Association of North America's EXPO

Eric L. Zalud spoke on *Current Contracting Issues for Freight Intermediaries*. Martha J. Payne and Stephanie S. Penninger attended. Marc S. Blubaugh attended as Outside General Counsel to the Association.
September 20–22, 2015 | Fort Lauderdale, FL

Center for Innovative Food Technology (CIFT)—Supply Chain Management Workshop

Stephanie S. Penninger spoke on *Food for Thought: Safety and Security Issues in the Transportation of Goods*.
September 24–25, 2015 | Perrysburg, OH

Annual Conference of the Council of Supply Chain Management Professionals

Marc S. Blubaugh and Aaron Mendelsohn served on a panel entitled, "If Not Now, When? Mandatory Data Security and Privacy Compliance for Corporate Directors and Managers."
September 28, 2015 | San Diego, CA

Annual Cargo Claims Conference at the International Air Transport Association

Marc S. Blubaugh presented *Flying or Just Falling With Style? The Latest from the U.S. Courts Regarding Cargo Claims Under MP4*.
September 30, 2015 | Montreal, Quebec

Annual Transportation Innovation and Cost Savings Conference

Eric L. Zalud attended.
September 30, 2015 | Toronto, Ontario

Indiana Motor Truck Association, Future Leaders Council Annual Conference

Stephanie S. Penninger attended.
October 1–2, 2015 | Bloomington, IN

Canadian Transportation Lawyers Association's Annual Conference

Martha J. Payne and Eric L. Zalud attended.
October 1–3, 2015 | Kelowna, British Columbia

International Warehousing Logistics Association's "Essentials" Course

Marc S. Blubaugh presented on *Fundamentals of Transportation Law: What You Need to Know about Transportation*.
October 9, 2015 | Phoenix, AZ

TIPS Admiralty and Maritime Law Committee Fall Meeting

Stephanie S. Penninger attended.
October 14–18, 2015 | Scottsdale, AZ

American Trucking Associations Management Conference & Exhibition

Marc S. Blubaugh and Richard A. Plewacki attended.
October 18–20, 2015 | Philadelphia, PA

23rd Annual TIDA Industry Seminar

Eric L. Zalud and Stephanie S. Penninger attended.
October 26–28, 2015 | San Antonio, TX

Transportation Law Institute (Transportation Lawyers Association)

Eric L. Zalud presented *Winning at Trial (and Pretrial) in Trucking Casualty Litigation*. Marc S. Blubaugh and Stephanie S. Penninger attended.
October 30, 2015 | Columbus, OH

Transportation Intermediaries Association 3PL Executive Leadership Forum

Eric L. Zalud attended and spoke on *Labor and Employment Issues in the Logistics Industry*.
November 9–11, 2015 | Houston, TX

2015 IWLA Warehouse Legal Practice Symposium

Marc S. Blubaugh presented *Are We There Yet? Transportation Law Update 2015* and *If You Don't Know Where You're Going, You Might Not Get There: Broker & Contracting*. Stephanie S. Penninger spoke on *What's Cooking?: The Road Ahead in Safely Storing, Securing and Transporting Goods*.
November 12–13, 2015 | Chicago, IL

2015 TerraLex Global Meeting

Eric L. Zalud attended.
November 9–12 | Nashville, TN

Cargo Logistics America—Expo and Conference

Christopher J. Lalak spoke on the *FSMA*.
December 2, 2015 | San Diego, CA

Journal of Commerce Ports Productivity Conference

Marc S. Blubaugh presented on *Reducing Dwell Time and Increasing Velocity at Maritime Terminals*.
December 8, 2015 | Newark, NJ

Capital Roundtable Conference on Private Equity Investing in Transportation, Logistics and Distribution

James M. Hill spoke and Eric L. Zalud, Marc S. Blubaugh and Richard A. Plewacki attended.
December 9–10, 2015 | New York, NY



ON THE HORIZON

Columbus Roundtable Council of Supply Chain Management

Marc S. Blubaugh will be moderating the Professionals Annual Transportation Panel. January 15, 2016 | Columbus, OH

BGSA Supply Chain Conference

Eric L. Zalud will be attending. January 20-22, 2016 | West Palm Beach, FL

Intermodal Association of North America's Board of Directors Meeting

Marc S. Blubaugh will be attending. January 20-21, 2016 | Charleston, SC

Transportation Lawyers Association's Chicago Regional Seminar

Stephanie S. Penninger will be presenting *Contract Protection—Protecting Brokers with Broker Carrier Agreements*. **Eric L. Zalud, Marc S. Blubaugh, Richard A. Plewacki, J. Allen Jones, III, Kevin M. Capuzzi, Thomas B. Kern, Kelly E. Mulrane, Brittany L. Shaw, and Jonathan Todd** will be attending. January 22, 2016 | Chicago, IL

ACI Admiralty & Maritime Claims and Litigation Conference

Stephanie S. Penninger will be attending. January 27-28, 2016 | Houston, TX

ABA TIPS Admiralty and Maritime Law Committee Meeting at the ABA Midyear Meeting

Stephanie S. Penninger will be attending. February 4-7, 2016 | San Diego, CA

BB&T Capital Markets Annual Transportation Services Conference

Marc S. Blubaugh will be speaking. **Eric L. Zalud** will be attending. February 10, 2016 | Coral Gables, FL

National Tank Truck Carriers' Winter Membership & Board Meeting

Richard A. Plewacki and **J. Allen Jones, III** will be attending. February 10-12, 2015 | Miami, FL

The Traffic Club of the Lehigh Valley

Stephanie S. Penninger will be speaking on *Hot Transportation Law Topics for 2016 and What's on the Regulatory Horizon*. February 16, 2016 | Bethlehem, PA

Lytix® User Group Conference

Eric L. Zalud will be attending. February 22-24, 2016 | San Diego, CA

International Warehousing Logistics Association's Annual Convention

Eric L. Zalud and **Marc S. Blubaugh** will be attending. March 13-15, 2016 | Orlando, FL

ABA TIPS Admiralty and Maritime Law Committee Panel

Stephanie S. Penninger will be speaking on *Know the Ropes When Flagging Your Vessel*. March 21-23, 2016 | Stamford, CT

Transportation Intermediaries Association Annual Conference

Eric L. Zalud, Martha J. Payne and **Stephanie S. Penninger** will be attending. April 6-9, 2016 | San Antonio, TX

Transportation Lawyers Association's Annual Conference

Marc S. Blubaugh, Eric L. Zalud, Martha J. Payne, Stephanie S. Penninger and **J. Allen Jones, III** will be attending the conference and executive committee meeting. April 27-30, 2016 | Destin, FL

42nd Annual Conference of the Transportation Logistics Council

Eric L. Zalud will be speaking. **Marc S. Blubaugh** will be moderating a panel on "Mitigating the Loss: Dealing with Damaged, Refused and Undeliverable Freight." May 2, 2016 | Albuquerque, NM

Conference of Freight Counsel

Eric L. Zalud and **Martha J. Payne** will be attending. June 5-6, 2016 | Toronto, Canada

Air Cargo 2016

Martha J. Payne will be attending. June 8-10, 2016 | Phoenix, AZ

For further information and registration, please contact **MEGAN PAJAKOWSKI**, Client Services Manager, at mpajakowski@beneschlaw.com or (216) 363-4639.

Transportation & Logistics Group

For more information about the Transportation & Logistics Group, please contact any of the following:

ERIC L. ZALUD, Chair | (216) 363-4178
ezalud@beneschlaw.com

MARC S. BLUBAUGH, Co-Chair | (614) 223-9382
mblubaugh@beneschlaw.com

MICHAEL J. BARRIE | (302) 442-7068
mbarrie@beneschlaw.com

MATTHEW D. GURBACH | (216) 363-4413
mgurbach@beneschlaw.com

JAMES M. HILL | (216) 363-4444
jhill@beneschlaw.com

J. ALLEN JONES, III | (614) 223-9323
ajones@beneschlaw.com

THOMAS B. KERN | (614) 223-9369
tkern@beneschlaw.com

PETER N. KIRSANOW | (216) 363-4481
pkirsanow@beneschlaw.com

CHRISTOPHER J. LALAK | (216) 363-4557
clalak@beneschlaw.com

STEPHANIE V. MCGOWAN | (317) 685-6161
smcgowan@beneschlaw.com

ANDI M. METZEL | (317) 685-6159
ametz@beneschlaw.com

T. TED MOTHERAL | (614) 223-9384
tmotheral@beneschlaw.com

KELLY E. MULRANE | (614) 223-9318
kmulrane@beneschlaw.com

LIANZHONG PAN | (011-8621) 3222-0388
lp@beneschlaw.com

MARTHA J. PAYNE | (541) 764-2859
mpayne@beneschlaw.com

STEPHANIE S. PENNINGER | (317) 685-6188
spenninger@beneschlaw.com

JOEL R. PENTZ (Of Counsel) | (216) 363-4618
jpentz@beneschlaw.com

RICHARD A. PLEWACKI | (216) 363-4159
rplewacki@beneschlaw.com

PETER K. SHELTON | (216) 363-4169
pskelton@beneschlaw.com

CLARE TAFT (Of Counsel) | (216) 363-4435
ctaft@beneschlaw.com

JOSEPH G. TEGREENE | (216) 363-4643
jtegreene@beneschlaw.com

KATIE TESNER | (614) 223-9359
ktesner@beneschlaw.com

JONATHAN TODD (Of Counsel) | (216) 363-4658
jtodd@beneschlaw.com